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No. 95 - 1065

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

REVEREND PAUL SCHENCK and
DWIGHT SAUNDERS,

Petitioners,

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK,
ET AL.,

Respondents.

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. INTRODUCTION

Respondents contend that the Petitioners are attacking "the reasoning and holding of this Court's recent decision in *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994)." Brief in Opposition [hereinafter "Opp."] at 12. Respondents further contend, that, to the extent the petition is not a wholesale attack on *Madsen*, "it is no more than a quibble about the application of *Madsen's* standard to a particular record." Id.[1]

This is simply not true. The decision below raises several major doctrinal questions of law under the First Amendment. Factual "quibbling" aside, the En Banc Second Circuit has as a matter of law, constructed a "pseudo-*Madsen*" which not only departs in clear and crucial respects from this Court's *Madsen* decision, but nullifies the heart of the First Amendment - the public forum doctrine - as well as this Court's longstanding tradition of protecting despised speech.

The petition for certiorari should be granted to prevent *Madsen's* replacement with a pseudo-*Madsen*, under which virtually any speech restriction on a public sidewalk, whether outside an abortion facility or anywhere else, can be upheld.

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[1] Respondents' position is highly ironic. In the Second Circuit, Respondents had no qualms about arguing that the case presented a "question [which] is a recurring matter of exceptional legal and medical importance." Petition for Rehearing and Suggestion for Rehearing in Banc at 1.

II. THE INJUNCTIVE RESTRICTIONS BURDEN SUBSTANTIALLY MORE SPEECH THAN NECESSARY TO SERVE LEGITIMATE GOVERNMENTAL INTERESTS

In their opposition, Respondents recount portions of the district court's findings concerning the Petitioners' "constructive blockade" of abortion facilities. What Respondents fail to note is that virtually all the complained-of behavior is prohibited under other provisions of the injunction, provisions which the Petitioners do not contest.[2]

Thus, the district court found, the Original Panel concurred, and the En Banc Court does not dispute that the demonstrators for the most part complied with the terms of the temporary restraining order, which was in effect for over 16

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[2] The district court itself set out the parameters of the undisputed provisions of the preliminary injunction:

> "Paragraph (a) *covers the full range of defendants' obstructive behavior*, including: obstructing and impeding access to and egress from the clinic, congregating in private driveways and parking lots, surrounding the cars of patients and staff as they try to enter the driveways and parking lots of the clinics, and crowding, shoving, or interfering with patients and staff as they approach the clinic on foot." Pet. App. at A-169.

Though these provisions of the injunction *by definition* prohibit "the full range" of activity threatening access, the district court at the very outset of the litigation imposed additional provisions severely restricting the petitioners' free speech rights. Then, in its ruling on the preliminary injunction, the court added yet more restrictions.

months. Yet, the court found this "unpersuasive" in considering whether the preliminary injunction was justified by the record.[3]

Respondents assert that the no-speech zone imposed by the preliminary injunction "simply establishes a small area around entrances, cars, and people in order to preserve access and reduce intimidation and physical or visual obstruction of entrances." Opp. at 10. In reality, the no-speech zone is not a single zone, but a constantly floating and fluctuating cluster of zones which surround each customer and vehicle approaching and leaving the abortion clinic.

Respondents assert that, under the cease and desist provision, Petitioners "remain free to continue to direct words at the original unwilling target from the distance of fifteen feet, a distance which means that some of their words are still likely to be audible to the target." Opp. at 10-11. Thus, even Respondents concede that the ability of Petitioners to communicate with persons fifteen away is reduced to the mere *likelihood* that *some* of their words will be heard.

Respondents also omit all mention of the conduct of their own agents. The record contains ample evidence that Respondents' escorts deliberately interfere with the Petitioners' attempts to communicate with persons entering and leaving the facilities, by raising their voices and physically blocking the Petitioners. *See, e.g.*, Pet. App. at A-148, n.6. Despite this interference, Petitioners are expected to be able to determine

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[3] The Winters Majority is even more perfunctory: "The bullying and planned blockade did not disappear from the record because most of the protestors were on good behavior while the preliminary injunction was under consideration." Pet. App. at A-45. In Judge Winters' opinion, apparently, the petitioners were just pretending to be peaceful and orderly for sixteen months.

when a person, or group, has indicated, "either verbally or non-verbally," that they wish the communication to cease. Pet. App. at A-170. Petitioners then must immediately comply with any perceived indications and withdraw fifteen feet, while being careful not to step into any number of other invisible no-speech zones, in place or floating around customers and vehicles approaching and leaving the facility. Failure to properly interpret and respond to a verbal or non-verbal indication that counseling is not desired carries with it liability for civil and criminal contempt and fines starting at $10,000.

Given that all conduct which impedes access is already prohibited by other provisions of the injunction, it defies reason to assert that these two provisions burden no more speech than necessary to serve a legitimate governmental interest.

A. The Alleged Governmental Interests Cited By The Lower Court In Upholding The Injunction Are Far Broader Than Those Cited By This Court In *Madsen*

As noted above, the En Banc Court did not dispute that the uncontested provisions of the injunction are sufficient to protect access. However the En Banc Court held that the goal of ensuring the safe performance of abortion justified restrictions on speech activity beyond those necessary to protect unfettered access. The court found persuasive the district court's reasoning that, specifically in the context of abortion facilities, there is a need for "a calm, quiet, stress-free atmosphere." Pet. App. at A-24. The preferential treatment that could cause a federal court to require that an abortion protest site be "stress-free" led dissenting Judge Altimari to call the Oakes Majority opinion "content-based." Pet. App. at A-73.

Respondents and the En Banc Court claim support for this proposition from *Madsen*, where this Court recognized a significant governmental interest in protecting "not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance." 114 S.Ct. at 2526; Opp. at 13. However, as Judge Meskill notes in his dissent:

> The *Madsen* Court simply recognized that women *in* the clinic were "held 'captive' by medical circumstance," [citation], thus supporting some of the injunction's restrictions, for example, those on banning loud noise levels or prohibiting the use of sound amplification equipment. This, however, does not mean that women *approaching* the clinic are captive, and nothing in *Madsen* can be read as so holding.

Pet. App. at A-64, n.5 (original emphasis).[4]

Judge Meskill's understanding of this Court's use of the captive audience exception is clearly in keeping with this Court's application of the *Madsen* test to the various injunctive restrictions at issue in that case. For example, this Court stated that "the accepted purpose of the buffer zone is to protect access and to facilitate the orderly flow of traffic on Dixie Way." 114 S.Ct. at 2528.

For that reason, this Court struck down portions of the zone where there was no evidence that the Petitioners had obstructed access or interfered with traffic: "We hold that on the

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[4] The Ninth Circuit, relying on the same language in *Madsen*, has held that "the Supreme Court in *Madsen expressly* recognized that persons *approaching* a health care facility represent a 'captive audience,' . . ." *Sabelko v. City of Phoenix*, 68 F.3d 1169, 1172 (9th Cir. 1995)(emphasis added).

record before us the 36-foot buffer zone as applied to the private property . . . burdens more speech than necessary to protect access to the clinic." *Id.* This Court did not go on to assess whether these buffer zones served the interest in protecting the physical and psychological well-being of women approaching the clinic. Conversely, the only time when this Court cited the health and well-being of patients was in discussing the prohibitions on noises audible and signs visible to persons inside the clinic.[5]

Thus, the En Banc Court's expansion of the captive audience exception threatens the well-established public forum doctrine.

III. THE PUBLIC FORUM DOCTRINE MUST BE RESTORED IN THE SECOND CIRCUIT

A. The Winters Majority Rejects This Court's Decisions In *Organization For a Better Austin v. Keefe* and *NAACP v. Claiborne Hardware*

The Winters Majority repeatedly declares that speech activity that is "coercive" is not constitutionally protected. Pet. App. at A-39, A-40, A-41, A-42, A-43. Yet this Court had held:

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[5] *Cf. Planned Parenthood Shasta-Diablo v. Williams*, 10 Cal.4th 1009, 43 Cal. Rptr. 2d 88, 898 P.2d 402 (1995) petition for cert. filed, No. 95-576 (October 6, 1995) (citing *Madsen's* discussion of noise restriction in upholding injunction confining all speech activity to area across street; state's interest in protecting health and well-being of patients justified zone to prevent "physical confrontations" causing "heightened stress and anxiety" on public sidewalk).

> The claim that the expressions [are] intended to exercise a *coercive* impact . . . does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence Respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper.

Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (emphasis added) (citations omitted).

Similarly, in *NAACP v. Claiborne Hardware*, 458 U.S. 886, 910-911 (1982), this Court held, "Speech does not lose its protected character, however, simply because it may embarrass others or *coerce* them into action." (Emphasis added).

The Winters Majority's newly divined "right not to be hassled in public" is dangerously at odds with this Court's prior decisions.

B. The Winters Majority Rejects This Court's Decisions In *Hustler Magazine v. Falwell*, *Houston v. Hill*, and *Tinker v. Des Moines*

The Winters Majority states: "The timid have a right to go about their business, and it is no embarrassment for a federal court to say so." Pet. App. at A-42. A federal court should be embarrassed, however, to elevate the "right" of the timid "to go about their business" above rights explicitly guaranteed by our Constitution.

This Court has frequently had to admonish lower courts which sought to keep the peace at the expense of the First Amendment:

> In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. [Any] word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom--this kind of openness--that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society.

Tinker v. Des Moines Ind. School District, 393 U.S. 503 (1969) (citations omitted). *See, also, Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (speech may not be penalized because it "may have an adverse emotional impact of the audience); *Houston v. Hill*, 483 U.S. 451, 462 n. 11 (1987)("if absolute assurance of tranquility is required, we might as well forget about free speech").

In spite of these admonitions, the Winters Majority feels called to protect those going about their lawful business not only from mere "isolated threats or obstructions" but even from the "chilling" effect of televised pictures of such conduct. Pet App. at A-42, A-41. The Winters Majority, in seeking "absolute assurance of tranquility," has indeed forgotten about free speech.

C. The Winters Majority Expands The Captive Audience Exception To Swallow The Public Forum Doctrine

As noted above, Respondents and the En Banc Court assert that *Madsen* held that women approaching health care facilities are a captive audience. This Court has defined a captive audience as those who are in a place "as a matter of

necessity, not of choice." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974). Thus, Respondents contend that women approaching a clinic to exercise their right to reproductive choice do not come as a matter of choice.[6]

This irony highlights the particular danger in the En Banc Court's decision, which danger is immediately illustrated by the Winter Majority. The En Banc Court has held, as a matter of law, that persons approaching abortion facilities are a captive audience, thereby allowing greater restrictions on speech directed at such persons. However, if this particular type of location and audience can be thus singled out, one must ask what other locations might also enjoy such protection. If the activity synonymous in the American lexicon with "choice" can be deemed by a court "a matter of necessity, not of choice," then there must be myriad other locations and activities where people should be considered captive audiences.

The Winter Majority helpfully provides a list of sites and audiences which should also receive this favored status, including "customers of a business, residents of a particular house, workers at a firm, the trustees of a university, military recruiters, delegates at a political convention . . . ." Pet. App. at A-41. Undoubtedly many others will come before courts, arguing that they, too, "are not voluntarily exposed to the protests" but are at a location which "they can only avoid at a cost."

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[6] It should be noted that if all women approaching an abortion facility were there "as a matter of necessity, not of choice," then there would be no reason for sidewalk counselors to attempt to speak to them. It is precisely because the women have *chosen* to come for an abortion, and can change their minds, that the picketers and sidewalk counselors are present.

In no uncertain terms, the Winters Majority is calling for the abandonment of the public forum doctrine.

IV. CONCLUSION

The Court should grant the petition for certiorari.

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February 19, 1996

Respectfully submitted,

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